

FEDERICO FABBRINI, ERNST HIRSCH BALLIN AND HAN SOMSEN (EDS)
 WHAT FORM OF GOVERNMENT FOR THE EUROPEAN UNION AND FOR
 THE EUROZONE? (HART PUBLISHING 2015)

Alessandro Petti*

The responses triggered by the euro crisis and the introduction of the *Spitzenkandidaten* procedure for selecting the President of the Commission have had significant implications for the constitutional construct and the political system of the EU. The volume edited by Fabbrini, Ballin and Somsen offers prime food for thought to reflect on fascinating issues ensuing from these recent developments. It constitutes a solid scholarly apparatus for understanding the status of the separation of powers within the EU and the Eurozone, the governance of the EU and the effectiveness and legitimacy of the EU institutional system. The focus is explicitly placed on the executive and the legislator. The editors move from the desire to mend the 'remarkable dis-engagement by legal scholars from the study of the form of the government of the EU'¹ and bring together contributions from EU lawyers, constitutional lawyers and political scientists from diverse academic cultures. A similarly interdisciplinary approach has featured in other perceptive and remarkably well-edited volumes on the fundamentals of the European project.² The originality of the book reviewed here rests on the combination of accurate insights on the EU constitutional dynamics with concrete reform proposals.

I will first discuss the chapters relating to the conception and functioning the EU institutional order, the 'New Intergovernmentalism' and the ensuing paradoxes of the EU constitutional order (Chs 2 and 14). Secondly, I will examine the contributions which address the governance of the Eurozone with a particular focus on the executive power (Chs 3 to 7 and 15). Thirdly, I will address the chapters tackling the pressing problem of democracy in the

* LLM European University Institute, alessandro.petti@eui.eu

¹ Federico Fabbrini, Ernst Hirsch Ballin and Han Somsen (eds) *What Form of Government for the European Union and for the Eurozone?* (Hart 2015) 3.

² D Chalmers, M Jachtenfuchs and C Joerges (eds), *The End of the Eurocrats' Dream* (CUP, 2016).

EU (Chs 8 to 10). Finally, I will review the contributions dealing with the trends towards the parliamentarisation of the European Commission (Chs 11 to 13).

The volume opens with a powerful foreword by Goulard who denounces that 'Europe' and 'Brussels' are increasingly perceived as the cause of all the woes of the Europeans. The contributions by Craig (Ch 2) and Puetter (Ch 14) offer a response to this widely shared belief suggesting a more balanced approach in assessing the shortcomings traditionally ascribed to the EU.

Craig provides acute observations on the EU's institutional structure and democratic deficit. He notices that, despite the recent attempts to reduce the divide between political power and the political responsibilities in the EU by linking the President of the European Commission (EC) to the dominant political forces in the European Parliament (EP), the underlying democratic fragilities of the EU constitutional construct remain in place. The radical changes in the EU's institutional design needed to alleviate the democratic malaise (such as a single elected President for the EU as a whole)³ were opposed by the Member States: from their perspective, an increased democratic legitimacy of the EU political order would come alongside a decrease in status of the national parliaments and executives that domestic leaders were reluctant to accept.⁴ Craig thus advocates for a broader conception of constitutional responsibility of the Member States which goes beyond mere legal accountability and has to be derived, *inter alia*, from the duty of sincere cooperation. Building on these premises, Craig scrutinizes the institutional design of the EMU and the measures adopted to counteract the euro crisis. He concludes that the reflections on how the financial crisis has affected the foundations of the EU, its legitimacy and its allocation of powers, should induce to 'think [...] about the constitutional responsibility of

³ Cf. the proposal of Fabbrini in fn 4 of this review.

⁴ Federico Fabbrini, Ernst Hirsch Ballin and Han Somsen (n 1), 21.

Member States⁵ [...], rather than working on the explicit or implicit assumption that the fault resides entirely with the EU'.⁶

Putter's chapter addresses a key institutional evolution of the EU, namely the emerging role of the European Council and its President. With rigorous, insightful and convincing arguments, the author qualifies the Maastricht Treaty as a turning point of the European integration entailing an integration paradox. Since Maastricht, Member State governments have displayed interests in pursuing further integration to tackle policy interdependencies while remaining unwilling to allocate additional competences at the EU level. The ensuing institutional change is an increased intergovernmental cooperation which operates at the level of the European Council and the Council producing a 'new Intergovernmentalism'. In this renewed intergovernmental cooperation, the President of the European Council acts as an institutional engineer rather than as a supranational policy entrepreneur. Puetter, therefore, questions the possibility envisaged by Fabbrini (Ch 16) to politicise the President's office through a EU wide electoral process.⁷ Puetter argues that the 'state of disequilibrium'⁸ emerging from the post-Maastricht integration paradox is not a transitory phenomenon which could be easily replaced by progressive communitarisation⁹ and hence supranationalisation.

The contributions by Craig and Puetter therefore emphasize the role of the Member States in shaping the EU constitutional construct giving a

⁵ The role played by the Member States in shaping EU constitutional architecture is also at the centre of the contribution of Sklias and Pantelis (Ch 4). The authors base their analysis on an erudite overview of EU integration theories and reach the conclusion that the original design of the EMU and the subsequent reforms to the euro governance have been characterized by an intergovernmental approach resulting from the convergence of interests of the most powerful member states, i.e. France and Germany.

⁶ *ibid* 36.

⁷ In his conclusive chapter, Fabbrini proposes a reform of the European Council consisting in the election of its President through a popular democratic process. This would endow the elected President with 'the necessary power and legitimacy to take authoritative decisions for the EU as a whole' *ibid* 304.

⁸ *ibid* 270.

⁹ *ibid* 269.

comprehensive explanation of the paradoxes and inconsistencies of the EU governance as it stands and as it will evolve in the future.

Several contributions to the volume address more specifically the governance of economic, monetary, and financial affairs in the Eurozone and in the EU with a focus on new institutional trends emerging in the exercise of the executive power. Callies (Ch 3) challenges the appropriateness of the current EU constitutional setting to tackle the multiple crises affecting the EU which stem from both technical and democratic deficits. The author praises the Community method as the expression of 'the dual legitimacy concept' based on the 'European principle of democracy' as expressed in Article 10(2) TEU which clarifies the channels of representation of the citizens and of Member State governments in the EU polity. He denounces that the 'pure intergovernmental form of coordination developed during the financial and debt crisis' resulted in the abandonment of the "Community method" characterizing European integration and the specific institutional balance set out in the European treaties'.¹⁰ Callies thus embraces a predominant thesis in the euro crisis literature, namely that the responses to the crisis have brought about a change in the EU constitutional balance towards a greater recourse to intergovernmental decision-making.¹¹

In the last sections of his chapter, Callies addresses the features that a viable Eurozone should have. The possibility of establishing an 'Euro-Parliament' composed of members of national parliaments is examined: this third chamber would complement the Council and the European Parliament. In the end of the contribution, the inevitability of Treaty reform is stressed. In case of absence of consensus, this reform could also take the shape of a 'Europe of two speeds' with the Treaty on Stability, Coordination and Governance in the EMU (TSCG) paving the way for structured patterns of differentiated integration. Callies' chapter intertwines perceptive and

¹⁰ *ibid* 40.

¹¹ See, *inter alia*, K Lenaerts, 'EMU and the European Union's Constitutional Framework'(2014) 39 ELR 753; E Chiti and PG Teixeira, 'The Constitutional Implications of the European Responses to the Financial and Public Debt Crisis', 50 CMLRev 683. This thesis has been challenged by de Witte: see B de Witte, 'Euro Crisis Responses and the EU Legal Order: Increased Institutional Variation or Constitutional Mutation?', (2015) 11 EuConst 434.

exceptionally sound legal analysis with original reform proposals. It is in the former that the contribution certainly excels. As far as the latter are concerned, I harbour doubts on the benefits of establishing the 'Euro-Parliament'. If its members would consist of national parliamentarians to ensure that nationally sensitive policy fields (economic, fiscal, budgetary and social policy) remain in the hand of domestic politicians,¹² it is not clear why this additional chamber should be established at the European level in the first place. Moreover, the national parliaments are represented in the EU decision-making process through their governments sitting in the Council. As convincingly argued by Kelemen (Ch 11), national parliaments should rather engage in shaping EU policies in their national capitals exercising effective parliamentary control over their governments.

Several other contributions address new developments in the economic governance of the Eurozone. De Streel (Ch 5) advocates for a better distinction between technical assessments and discretionary choices in the European economic governance. He contends that the latter should be more clearly identifiable and better legitimised instead of remaining concealed behind the intricacies of the EU economic analysis. Beukers (Ch 6) provides a compelling explanation of the relationship between the ECB and the executive power in the EMU. He maintains that the unconventional exercise of the ECB's power and the role played by the ECB in the *Troika* 'justifies speaking of central bank intervention in the area of policy-making'.¹³ He also underlines that this development has not been accompanied by a reinforcement of the ECB's accountability structures. In chapter 7, Lo Schiavo elegantly describes the origins, the functioning and the governance structures of the Single Supervisory Mechanism (SSM). Building upon Schütze's findings on cooperative federalism in EU administrative law, he offers an original characterization of the relationship between the ECB and the National Competent Authorities. Lo Schiavo's contribution could have benefited from a more detailed inquiry into the sensitive issue of separation of the supervisory and monetary policy in the EMU governance framework. When addressing this issue, Lo Schiavo first challenges the effectiveness of the separation between monetary and supervisory functions in the current

¹² Federico Fabbrini, Ernst Hirsch Ballin and Han Somsen (n 1), 55.

¹³ *ibid* 106.

institutional set-up. Then, he cautiously suggests that a 'relative separation'¹⁴ is in place, relying on the fact that the SSM Regulation provides for the separation of the meetings and the agendas of the Governing Council when exercising the two functions. The institutional practice will reveal whether this relative separation would be sufficient and appropriate.

Some of the most rewarding contributions to the volume focus on the functioning of the EU polity through the lenses of representation, participation and accountability. Relying upon Urbinati's theoretical framework, Piattoni (Ch 8) analyses the status of the EU representative democracy through the prism of three fundamental functions of representative assemblies, namely, 'voice', 'will' and 'control'. She unveils the 'peculiar' division of labour between representative assemblies, convincingly arguing that the 'wrong' questions are addressed in the 'wrong assemblies'.¹⁵ On the one hand, national parliaments debate on policy measures already decided at the EU level. On the other hand, the European Parliament's elections are focused on whether and to which extent the EU should legislate, 'not on how [its members] actually (co-)legislate'.¹⁶ The author contends that the euro crisis has rendered this peculiar division of labour more evident. Yet, she maintains that representative assemblies are trying to bring back 'voice' and 'will' in the appropriate *loci*. National parliaments have 're-appropriated their constitutional role'¹⁷ and have started to address the possibility of reforming the Union.

Among the most compelling issues defining the current status of the EU democracy, 'executive dominance' features prominently. Curtin (Ch 10) characterizes this phenomenon as 'the migration of executive power towards types of decision-making that eschew forms of electoral accountability and popular democratic control'.¹⁸ She scrutinizes the evolution of the EU executive power in its various manifestations: the 'leading' (the European Council); the 'normal' (the Commission) and the 'intervening' (the ECB). Curtin thoroughly examines the law and practice of the three manifestations

¹⁴ *ibid* 122.

¹⁵ *ibid* 133.

¹⁶ *ibid* 145.

¹⁷ *ibid* 149.

¹⁸ *ibid* 174.

of the executive power grounding her analysis on both Treaty obligations and institutional working practices. She also sets the exercise of executive power against the three different stages of accountability she identifies. Curtin's findings are not entirely reassuring on the status of the EU democracy. She powerfully captures the gist of the challenges of accountability in the EU underlining that the EP does not adequately challenge the dominance of the executive actors at the EU level.¹⁹ Less bleak is the picture she portrays of some national parliaments, as the House of Commons in the UK, which have been able to exert countervailing power to confine the executives.²⁰ The author's reform proposal is oriented towards a less executive-dominated future to be achieved through more constructive horizontal dialogue between parliaments. Curtin is very effective in pointing out that the capacity and the responsibility of parliaments to fully exercise their role in the political system without being dominated by the executives ultimately rest with the parliaments themselves.²¹ The necessity for the European and national parliaments to effectively exercise their controlling roles *vis á vis* the executives is crucial in light of the shortcomings, accurately highlighted by Marxsen (Ch 9), of the mechanisms of participatory democracy in the EU.²²

A final cluster of contributions enters into the engaging debate on the institutional parliamentarisation of the EC brought about by the European Parliament elections in 2014. Kocharov (Ch 13) provides sound arguments against what she depicts as the 'Spitzenkandidaten invention'.²³ After a thoughtful scrutiny of the letter of the Treaty, she finds that assigning a dominant position to the Parliament in nominating the candidate for President of the Commission would amount to a change necessitating Treaty

¹⁹ *ibid* 192.

²⁰ Albeit written before the Brexit referendum, Curtin's observations on the House of Commons maintain their validity in explaining how national parliaments could counteract the executive dominance.

²¹ *ibid* 193.

²² According to some commentators, the democratic legitimacy of the EU could be increased through the institutionalisation of inter-parliamentary cooperation as envisaged in Article 13 TSCG. Kreiling (Ch 15) recognises the potential of this cooperation to counteract the executive dominance. He advises, however, against the possibility of the inter-parliamentary cooperation bodies to acquire decision-making powers arguing that this would alter the EU inter-institutional equilibrium.

²³ *ibid* 234.

amendment. Indeed, this would revert the procedure envisaged by the Treaties.²⁴ In addition, Kocharov denounces the inappropriateness of the politicization of the Commission through an inquiry into the spirit of the treaties. Since the European Commission is not ultimately driving the European policy choice²⁵, assigning accountability for shortcomings in the EU policy output to the President of the Commission would allow Member State governments to 'evade democratic accountability in the national political process'.²⁶ With a remarkable intellectually sophisticated analysis of the peculiar constitutional construct of legitimacy of the EU, she highlights the pitfalls entailed in modelling accountability for Union policies on that of a state. According to Kocharov, in the current Treaty framework, 'legitimacy of the Union derives from the national political process'²⁷ and as '[a]ccountability needs to follow the *locus* of power', the attempts to devise a European democracy which 'bypasses accountability on the national level' exacerbates the risks of undermining the legitimacy of both the Union and national governments.²⁸

Antphöler (Ch 12) shares Kocharov's criticism towards 'unwarranted analogies with nation states' and towards the progressive erosion of the agenda-setting powers of the Commission.²⁹ He reaches, however, opposite conclusions. Antphöler convincingly describes article 17(7) TEU as a provision 'offer[ing] a framework for the political process to function' which does not enshrine any 'duty for the institutions to behave in a certain manner'.³⁰ He therefore questions the utilization of the dichotomy of legal/illegal for assessing the *Spitzenkandidaten* procedure. I found myself in accord with this characterization. I think that the politicization of the European Commission's President, albeit legally and politically contestable,

²⁴ *ibid* 238.

²⁵ According to this thesis, notwithstanding the power of initiative enjoyed by the EC pursuant to article 17 TEU, the Commission has progressively witnessed a decrease of powers in this respect. Cf fn 61 at 246. This thesis is also shared by Antphöler (p 219).

²⁶ *ibid* 247.

²⁷ *ibid* 249.

²⁸ *ibid* 233.

²⁹ *ibid* 219. Cf. considerations made by Kocharov, at 242 and 246 respectively.

³⁰ *ibid* 222.

demonstrates how the mechanisms governing the dynamic evolution of a legal system may change the legal norms themselves.³¹ As it has been convincingly argued, this dynamic reflects 'the primacy of politics over law'.³² Antphöler goes further, maintaining that the 'increased democratic credential of the Commission and stronger standing in public'³³ resulting from this procedure could counteract the fragile democratic foundations of the depoliticized and intergovernmental crisis management and the European Council predominance. I am, however, rather sceptical that this change would produce any improvement in terms of democratic legitimacy of the EU. As emphasized by Craig, the EP and the EC are not the only centres of political decision in the EU, and the role of the Council and the European Council in determining the EU policy agenda is not affected by this new procedure. Doubts on this matter are also casted by Kelemen. In his thought-provoking contribution, Kelemen underlines the inappropriateness of trying to export Westminster, majoritarian visions of democracy to the EU, which remains a consensus democracy. Moreover, he perceptively points out the negative consequences that might arise from the politicization of the Commission President and from the strengthened participation of the national parliaments in the EU governance.

In conclusion, albeit the book certainly delivers on its promises, the analysis on how the governance in the EU and Eurozone works could have been explored further with an inquiry on the role played by the EU in the global financial and economic institutions. Indeed, the separation of powers in the EU manifests all its complexity in the external representation of the euro area. A discussion on the proposals of institutional reforms in this domain could have offered a more comprehensive picture on the system of governance of the EU and the Eurozone. Moreover, one of the major controversial issues on which the book is premised is the existence of an EU government. The EU is traditionally understood as a system 'governance without Government' and the absence of the possibility to replace a government responsible of discretionary policy choices through the elections

³¹ S. Romano, *L'Ordinamento Giuridico* (2nd edn, Giuffrè 1946), 15-16.

³² JHH Weiler, 'Editorial-European Parliament Elections 2014: Europe's Fateful Choices'(2016) 24 EJIL 747, 750.

³³ Federico Fabbrini, Ernst Hirsch Ballin and Han Somsen (n 1), 232.

lies at the very foundations of the EU's problems of accountability and representativeness.³⁴ Only Curtin engages in the exercise of explaining the interrelationship between governance and government in the EU.³⁵ Given the crucial relevance of this issue for the development of the themes addressed in the book, it would have been beneficial if this clarification exercise had been undertaken at the beginning of the volume by the editors or in a dedicated contribution.

The issues tackled in the book eschew easy simplifications. The responses to the euro-crisis have elicited complex transformations in the intra-EU allocation of powers. New delicate supervisory functions have been assigned to the ECB. The Commission has seen strengthened its role in the coordination and sanctioning of the Member States' fiscal policies. These changes have not been accompanied by equally significant improvements in the legitimacy and accountability of the EU constitutional construct. In particular, the *Spitzenkandidaten* procedure and other attempts to overhaul the democratic foundations of the EU have not produced the expected results. The contributors have managed to present these knotty issues in a clear and refined manner. This is one of the major strength of the volume which constitutes a valid point of reference for scholars and policy-makers interested in the debate on the challenges the EU and the EMU are facing.

³⁴ JHH Weiler 'Living in a Glass House: Europe, Democracy and the Rule of Law', in C Closa, D Kochenov and JHH Weiler (eds), *Reinforcing Rule of Law Oversight in the European Union*, EUI Working Paper, RSCAS 2014/25, 25.

³⁵ Federico Fabbrini, Ernst Hirsch Ballin and Han Somsen (n 1), 175.